IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 963

UNIVERSITY NATIONAL STOCKHOLDERS PROTECTIVE COMMITTEE, INC.

Petitioner,

vs.

UNIVERSITY NATIONAL LIFE INSURANCE COMPANY, ALBERT M. SCRUGGS, JOHN R. C. ELDER, JOHN COSTEN, MALCOLM DEISENROTH, JR., ROBERT LEE HOUSER, MILO C. MORGAN, SIDNEY E. LEIWANT, ROBERT L. DOBBS and RUDOLPH V. RUSSELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Sixth Circuit

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To the United States Court of Appeals, Sixth Circuit

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner is very much aggrieved by the decision of the United States Court of Appeals, Sixth Circuit, in this cause and prays that a Writ of Certiorari issue to review its opinion and action in the case of *N. E. Dacus et al.* v. *Barry M. Carter et al.*, No. 15,655 in said Court.

OPINION BELOW

An opinion and judgment were entered by the United States Court of Appeals, Sixth Circuit, on March 3, 1964, the same not having been at this time published. A copy of said opinion and judgment is printed in full as Appendix A, which is bound separately.

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Sixth Circuit, was rendered and entered on March 3, 1964.

No petition to rehear was filed and no extension of time within which to petition this Court for certiorari was sought.

Jurisdiction of this Court is invoked under the provisions of Chapter 646 of the Act of June 25, 1948; 28 U.S.C.A., Sec. 1254(1). Jurisdiction of the United States Court of Appeals affirmatively appears upon the record.

QUESTIONS PRESENTED

I

Is a litigant required to await the review of his cause on appeal from the final judgment of a District Court before he can obtain relief from arbitrary, capricious or unlawful interlocutory orders of the District Court from which he will suffer severe and irreparable injuries in the interim?

II

Is a litigant's right to equal protection, privileges and immunities under the law as guaranteed to him by the Constitution of the United States violated where the District Court denies him the protection, privileges and immunities provided by the Federal Rules of Civil Procedure?

III.

Does a District Court act in excess of jurisdiction in altering and varying the provisions of the Federal Rules of Civil Procedure?

CONSTITUTIONAL PROVISION AND FEDERAL LAWS AND RULES OF CIVIL PROCEDURE INVOLVED

Constitution of the United States

Amendment 5. No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation.

United States Code

Title 28, Section 1651. Writs.

(a) The Supreme Court and all Courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a Court which has jurisdiction. June 25, 1948, c. 646, 62 STAT. 944, amended May 24, 1949, c. 139, § 90, 63 STAT. 102.

Federal Rules of Civil Procedure

Rule 6(d)—For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

Rule 12(b)—How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse

party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 30(a)—Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

Rule 30(g)(1)—Failure to Attend or to Serve Subpoena; Expenses. If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 37(a)—Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all

persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

Rule 45(b)—For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 45(c)—Service. A subpoena may be served by the marshal, by his deputy, or by any other person who

is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

Rule 45(d)(1)—Subpoena for Taking Depositions; Place of Examination. Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

STATEMENT OF THE CASE

On or about July 18, 1963, J. T. Street, Jr., Bobby S. Street, Falba Simmons, Curtis A. Greer and a number of other individuals, all being citizens and residents of the State of Mississippi, and owners of stock in University National Life Insurance Company, a corporation organized and existing under the laws of the State of Tennessee with its principal place of business or Home Office at Memphis, Tennessee, brought suit in the United States District Court for the Western District of Tennessee, Western Division, in their individual capacities as stockholders of said life

insurance company and for the use and benefit of all other stockholders similarly situated, it being alleged that there were approximately 8,000 stockholders in all owning more than 1,300,000 shares of stock in this corporation, against the Directors of the corporation and others under the provisions of Title 28, Section 1332, U.S.C.A., averring that there was a complete diversity of citizenship between Plaintiffs and Defendants and that the matter in controversy exclusive of interests and costs exceeded $10,000.00. (A39)

The primary purpose of the complaint was to recover what Plaintiffs alleged to be a loss of more than $2,000,000.00 resulting from the mismanagement of the corporate affairs of University National Life Insurance Company and the wasting of its funds and assets by its officers and Directors. It was alleged that demand had been made upon the corporation and its recently elected Directors to bring a suit to recover the funds and assets so wasted but that they had refused to take any such action. (A57) Also named as Defendants were Petitioner herein and eight of its Directors alleging that the said eight Directors had filed a suit in the Chancery Court of Shelby County, Tennessee, seeking substantially the same relief as sought by Plaintiffs in the United States District Court, and that said suit had been dismissed by the Chancery Court Complainants without the consent of the other stockholders and without notice to them. (A53, A54) Petitioner filed an answer to the original complaint and a cross-claim against Respondents University National Life Insurance Company, Albert M. Scruggs, John R. C. Elder, John Costen, Malcolm Deisenroth, Jr., Robert Lee Houser, Milo C. Morgan, Sidney E. Leiwant, Robert L. Dobbs and Rudolph V. Russell. Petitioner through its cross-claim sought a judgment against those named as Respondents herein for the sum of $48,781.28 and a judgment against the individual

Respondents for the benefit of Respondent University National Life Insurance Company for all funds in the monetary equivalent of other things of value belonging to University National Life Insurance Company spent in the defense of its officers and Directors who are determined to have inflicted damage upon and injury to it, either by corruption, waste, mismanagement, misconduct, immorality or scandalous behavior, and those who permitted such acts and practices through gross negligence or ethical indifference. (A92, A93, A94)

No other responsive pleadings were filed, all other Defendants and Cross-Defendants having filed motions to dismiss, motions to enlarge the time in which to plead and a motion to require attorneys for Cross-Plaintiff to show authority to act as attorneys for Cross-Plaintiff.

Shortly after the complaint was filed Defendant University National Life Insurance Company served notice upon Plaintiffs that it desired to take the pre-trial discovery deposition of Plaintiffs on August 6, 1963, to which Plaintiffs filed a motion to stay the taking thereof on the ground that the motion to dismiss the complaint filed by said Defendant would be dispositive of the complaint if sustained by the Court. On September 6, 1963, the Court granted leave to Plaintiffs to amend their complaint to cure the defect upon which Defendants predicated their motion to dismiss and Defendant life insurance company thereafter immediately served notice upon attorney for Plaintiffs that it desired to take Plaintiffs' depositions on September 19, 1963. Plaintiffs moved the Court to order the depositions taken in a central location rather than requiring Plaintiffs to travel great distances to Memphis, or in the alternative that their depositions be taken by interrogatories, which motion was, on September 19, 1963, overruled by the Court and said depositions ordered to be taken on September 20, 1963.

Attorney for Petitioner suffers from an allergy to autumn pollens (ragweed, goldenrod, etc.) resulting in severe vertigo completely disabling him when afflicted. He was overcome by this disability beginning on or about September 17, 1963, and extending through more than the first 15 days of October, 1963, and he was unable to attend the Court proceedings on September 19, 1963, and on September 19, 1963, filed a sworn petition with the certificates of two physicians attached seeking a delay in the taking of Plaintiffs' depositions, which petition the Court peremptorily overruled. (A6)

Plaintiffs' attorney was unable to give his clients sufficient notice and the depositions of Plaintiffs were not taken until October 1, 1963. Petitioner's attorney was forced to attend the taking of these depositions under the aforedescribed disability which renders him unsteady upon his feet and, at times, nauseated, and disrupts his equilibrium when required to move from a stationary position. The Court took the position that this was a quarrel between Plaintiffs and Defendant life insurance company and that Petitioner had no such interest in the dispute as to warrant a delay so as to permit its attorney to attend the taking of Plaintiffs' depositions. (A7)

On or about September 6, 1963, Defendant Robert L. Dobbs procured and caused to be issued subpoenas requiring J. R. Tipler, Rudolph Russell, W. F. Jameson, George A. Davis, Barry M. Carter, J. D. McElroy, R. T Matthews, Luke Borger, Vernon Goedecke, Roy E. Barnette, Carl J. Gates, and Robert L. Taylor to appear in Defendant Dobbs' office at 10 o'clock a.m., September 16, 1963. However, said Dobbs failed to give notice as required by Rule 45 (d) (1) of the Federal Rules of Civil Procedure and failed to tender the witnesses the attendance fees and mileage as required by Rule 45(c) of the Federal Rules of Civil Pro-

cedure. These Deponents filed a written motion to quash said subpoenas for these reasons. (A7)

Defendant Dobbs, apparently as an afterthought, on September 8, 1963, mailed out the notices required by Rule 45(d)(1) and certified in and by the name of Thomas *H.* Douglas, Jr., that the said notices had been served upon adversary counsel on September 6, 1963. (A7)

The failure of Dobbs to give adversary counsel notice as required by Rule 45(d)(1), and his failure to tender attendance fees and mileage having rendered the subpoenas served upon them void and inoperative, and the District Judge having previously held that a motion to quash a subpoena requiring a witness to appear and give his deposition under these circumstances had the effect of staying the taking of the deposition until disposition was made of the motion. The Deponents did not appear as commanded on September 16, 1963. (A8)

On September 23, 1963, Defendant Dobbs filed a "Motion to Require *Plaintiffs* (sic) to Appear and Give Depositions," which sought an order of the Court requiring the above named persons to appear and give their depositions "under penalty of being in contempt" of Court, inferring, if not alleging, that said persons had violated an order of the Court. (A8)

A notice was appended to said motion addressed to attorneys for adversary parties notifying them to appear before the District Judge at 4:30 p.m. on Tuesday, September 24, 1963, and stating that the matter would at that time be heard by the Court. (A8) Thomas *E.* Douglas, Jr., attorney for Defendant Robert L. Dobbs, certified that he had served a copy of said motion and the notice upon opposing attorneys and witnesses against whom an order to appear and give their depositions was sought, by delivering

a copy of the same at their offices. No such motion or notice was served upon attorneys for Petitioner or any of the persons whose depositions were sought and they had absolutely no notice that the motion was to be heard. (A8, A21, A22, A98, A99, A100, A107, A108, A109, A110, A111)

Pursuant to said motion and notice, in an ex parte proceeding, the Court overruled the motion of said witnesses to quash the subpoena served upon them and ordered them to appear at the office of the Clerk of the United States District Court, Western District of Tennessee, Western Division, Federal Building at Memphis, Tennessee, at 9:30 a.m., on October 2, 1963, then and there to give their depositions, the order directing Defendant Dobbs to give notice as required by Rule 45(d)(1) but waiving the obligation upon Defendant Dobbs requiring him to tender mileage, in violation of their rights under the Federal Rules of Civil Procedure and the laws and the Constitution of the United States of America. (A8, A9, A35) On or about September 26, 1963, an order was entered in this cause in accord with the ruling of the Court of September 24, 1963, and Defendant Dobbs procured and caused to be served by the office of the United States Marshal, subpoenas for J. R. Tipler, George A. Davis, Barry M. Carter, J. D. McElroy, R. T. Matthews, Luke Borger, Vernon Goedecke, Carl J. Gates and Robert L. Taylor, requiring each of them to appear at the office of the United States District Court Clerk on October 2, 1963, at 9:30 o'clock a.m. to give their depositions, a copy of the Court's order of September 26, 1963, being attached to each subpoena for the purpose of frightening and intimidating the prospective witnesses. (A9) The subpoena served upon Robert L. Taylor commanded him to bring with him "all minute books, minutes of directors and stockholders meetings, minutes of meetings of liquidating agents,

stock books, bank accounts, book and/or ledgers of account and financial records of any type whatsoever of University National Stockholders Protective Committee, Inc." (A9) On or about the same day, September 26, 1963, Defendant Dobbs served notice upon all counsel representing parties to this litigation that he would on October 2, 1963, take the depositions of the witnesses for whom he had procured subpoenas, continuing *from day to day* until completed. (A9, A10)

On October 1, 1963, Petitioner along with Deponents J. R. Tipler, George A. Davis and Barry M. Carter served notice upon adversary counsel that they would on October 8, 1963, at 2 o'clock p.m., take the depositions of Defendants and Cross-Defendants Robert L. Dobbs and Rudolph V. Russell, and their attorney, Thomas E. Douglas, Jr. On October 2, 1963, subpoenas were issued for Dobbs, Russell and Douglas, commanding them to appear and give their depositions on October 8, 1963, in accord with said notice. (A10, A123, A124)

Pursuant to the order of Court of September 26, 1963, J. R. Tipler, George A. Davis, Barry M. Carter, J. D. McElroy, Luke Borger, Carl J. Gates and Robert L. Taylor appeared at the office of the Clerk of the United States District Court on October 2, 1963, at 9:30 o'clock a.m., and depositions were taken on October 2 and October 3, 1963, at which time they were adjourned until October 7, 1963. By October 7, 1963, all depositions of subpoenaed witnesses had been taken except that of Robert L. Taylor. On that day he appeared at the office of the Clerk at 9:30 o'clock a.m. as required by the subpoena served upon him and as provided by the notice, and pursuant to the order of the Court, and remained within the immediate vicinity in full view of everyone concerned, and in conversation with most of adversary counsel until approximately 10:10 o'clock

a.m. at which time he departed. At 10 o'clock a.m. he requested that the taking of his deposition be commenced but was advised that it could not be done until Dobbs, his lawyer and the Court reporter arrived. (A10, A11, A117, A118)

Later in the day upon the request of Respondents Petitioner's attorney agreed to and did present himself for examination and gave his deposition as commanded by the subpoena served upon him even though adversary counsel had forfeited their right to take his deposition under and upon the authority of the subpoena issued September 26, 1963. At approximately 6:03 p.m. after said witness had been examined by all adversary counsel he was advised that the taking of his deposition was being adjourned until 1:30 o'clock p.m. on the next day, October 8, 1963. The witness requested that his examination be concluded and advised adversary counsel that he was unwilling to enter into any agreement to adjourn to any time other than as provided by Defendant Dobbs' notice and subpoena, and the Federal Rules of Civil Procedure. Accordingly, he presented himself at the office of the Clerk of the District Court on October 8, 1963, at 9:30 o'clock a.m. as required by the subpoena and notice served upon him, and after waiting until 9:50 a.m., he departed when neither adversary counsel, Defendant Dobbs or the Court stenographer made an appearance. (A11, A12, A112, A113, A114, A115)

On the same day at approximately 1:30 o'clock p.m. Thomas E. Douglas, Jr., attorney for Defendant Dobbs, telephoned Robert L. Taylor and advised him that all adversary counsel was assembled in the office of Canada, Russell & Turner, waiting for him to present himself for further examination. Mr. Douglas was advised that Petitioner had given notice and caused subpoenas to be issued

and served upon Dobbs, Russell and Douglas to be present at the offices of Taylor & Taylor, 208 Adams Avenue, in Memphis, at 2 o'clock p.m. and that Mr. Taylor was awaiting their arrival. Obviously, he could not be present in two places at the same time. At approximately 1:55 p.m. of this same day Dobbs, Russell and Douglas, and all of the lawyers involved in this case, arrived at the offices of Taylor & Taylor. The Court reporter arrived before 2 o'clock p.m. Dobbs, Russell and Douglas announced that they refused to give their depositions until Taylor's had been concluded. When Taylor refused on the basis that the place and time had been designated for the taking of the depositions of Dobbs, Russell and Douglas, said deponents, and all of the adversary attorneys departed with the statement that they intended to take the matter up with the Judge of the District Court. (A12, A13) Attorneys for all the parties appeared before the United States District Judge at 9 o'clock a.m. on the morning of October 9, 1963. Upon the oral application of Respondent Robert L. Dobbs the District Judge ordered Robert L. Taylor to make himself available for further testimony by deposition before Dobbs, Russell and Douglas should be required to give their depositions. (A38)

At the taking of his deposition on October 7, 1963, Robert L. Taylor stated that he had brought with him all of the documents in his possession which he had been commanded to bring by the subpoena duces tecum issued on behalf of Defendant Dobbs, but he refused to exhibit them for the following reasons:

(1) Defendant Dobbs was neither an officer, director or stockholder of University National Stockholders Protective Committee, Inc., and, therefore, had no vested right in the affairs of that corporation, or the right to examine its books and records.

(2) No party to the litigation, except the Petitioner herein, had filed a responsive plea.

(3) There was no claim asserted in any of the pleadings that the stockholders had not paid in to the corporation the stated value of stock issued, or that there had been any misuse or misappropriation of this corporation's funds, or that the corporation's officers or directors had committed ultra vires acts.

(4) The books and records were of a confidential nature and privileged to its stockholders.

Upon the oral application of Defendant Dobbs, the District Judge directed Robert L. Taylor to produce for examination by all parties those items or documents listed in the subpoena duces tecum issued at the request of Defendant Dobbs on September 26, 1963, and served upon Robert L. Taylor on or about September 27, 1963. (A13, A14, A38, A118, A119)

On October 11, 1963, Petitioner and Defendants Barry M. Carter, George A. Davis, J. R. Tipler, Luke Borger, Vernon Goedecke, R. T. Matthews, Carl J. Gates and their attorney, Robert L. Taylor, moved the Court to quash the subpoenas served upon Robert L. Taylor requiring him to produce the documents hereinabove set out and as he was commanded to produce under the subpoena duces tecum issued on September 26, 1963, and to expunge and strike from the record the motion of Respondent Robert L. Dobbs to require Plaintiffs (sic) to give pre-trial depositions. On the same day Robert L. Taylor, attorney for said Defendants and one of the attorneys for Petitioner herein, moved the Court to require Respondent Dobbs to compensate him by reason of the failure of said Dobbs to attend the taking of the deposition of Robert L. Taylor pursuant to notice and subpoena on October 7 at 9:30 o'clock a.m. and October 8 at 9:30 o'clock a.m. as provided by Rule 30(g)(1) of the Federal Rules of Civil Procedure.

(A14, A15, A36, A37, A111, A112, A113, A114, A115) By order entered October 24, 1963, the District Court took the following action to which Petitioner objects and here complains:

(1) It directed Robert L. Taylor to establish and show his authority to file an answer and cross-claim on behalf of University National Stockholders Protective Committee, Inc.

(2) It reaffirmed its action in overruling the written motion of Barry M. Carter et al., and their attorney, Robert L. Taylor, to quash the subpoenas issued on September 6, 1963, requiring them to give their depositions on September 16, 1963.

(3) It sustained the written motion of Respondent Robert L. Dobbs to require Robert L. Taylor to appear and give his deposition.

(4) It denied and overruled the written motion of J. R. Tipler et al., and their attorney, Robert L. Taylor, to expunge and strike from the record in this cause the motion of Respondent Robert L. Dobbs to require J. R. Tipler, George A. Davis, Barry M. Carter, Luke Borger, Vernon Goedecke, R. T. Matthews, Carl J. Gates and Robert L. Taylor to give their depositions on October 2, 1963, and to set aside and vacate the Court's order entered September 26, 1963.

(5) It denied and overruled the written motion of Robert L. Taylor to require Respondent Robert L. Dobbs to compensate him for his failure to appear in accordance with notice and subpoena served upon said witness as provided by Rule 30(g)(1) of the Federal Rules of Civil Procedure.

(6) It overruled the motion of Barry M. Carter et al., and their attorney, Robert L. Taylor, to quash the subpoena issued on September 26, 1963, requiring Robert L. Taylor to produce the minute books, minutes of meetings of the directors, liquidating agents and

stockholders of University National Stockholders Protective Committee, Inc., its stock books, bank accounts statements, books and/or ledgers of account and financial records and directed him to appear in the offices of Thomas Price, Esq., in the Union Planters Bank Building, 67 Madison Avenue, Memphis, Tennessee, on Monday, October 21, 1963, at 9:30 o'clock a.m. and then and there subject said records to the examination of all the parties to this litigation and their attorneys of record.

(A34, A35, A36, A37, A38)

Petitioner sought a review of this order of the District Court by filing with the United States Court of Appeals, Sixth Circuit, a petition for certiorari and supersedeas averring that it was very much aggrieved by the action of the District Judge as above related and that it would suffer an irreparable injury unless the relief sought were granted. A copy of the order of the District Court entered October 24, 1963, is included herein as Appendix B.

REASONS WHY THE WRIT SHOULD BE GRANTED

Petitioner is very much aggrieved by the action of the learned District Judge as above related and would respectfully show that he acted arbitrarily, capriciously and in excess of jurisdiction. Much of what he has done cannot be undone and Petitioner, its officers, directors and attorney must suffer the injury inflicted upon them without recourse. However, much of that which Petitioner complains remains unexecuted and this Court can and should rectify the error committed by the District Court.

Through the impact of its opinion, the Court of Appeals has pressed upon this Court the positive and impelling necessity and urgency of review and consideration for all five of the special and important reasons set out in Rule 19 of this Court, Section 1(b). These are:

1. The Court of Appeals, Sixth Circuit, has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter.

2. The Court of Appeals in this cause has decided a question of substantative law in a way in conflict with the applicable law of the State of Tennessee.

3. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

4. The Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court.

5. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

ARGUMENT

I

Did the District Court act arbitrarily and in excess of jurisdiction in directing attorneys for Petitioner to show authority to act as its attorney?

Neither the United States Code nor the Federal Rules of Civil Procedure provide for any such plea or defense. Rule 12(b) of the Federal Rules of Civil Procedure governs defensive pleas. That rule sets out in detail which defenses must be set up by motion and which defenses must be asserted by a responsive plea. There is nothing in this rule from which one could glean language which could be construed to permit such a motion.

In the District Court Respondent Dobbs contended that this plea was authorized by Rule 11 of the Federal Rules of Civil Procedure. However, in the Court of Appeals he appeared to lose confidence in this position and never again mentioned that in his argument. Instead he cited three cases which he contended had broadened Rule 12(b) to permit a Defendant to make this defense by motion. These cases are:

Pueblo of Santa Rose v. *Fall*, 273 U.S. 315 (1926).

Sutherland v. *International Insurance Co.*, 43 F.2d 969 (1930).

McLean v. *Burkinshaw*, 107 F.2d 665 (1939).

It is interesting to note that the first two of these three cases were decided prior to the adoption of the Federal Rules of Civil Procedure and that the third is not applicable because it related to the motion of a Plaintiff to strike the answer of a Defendant where it was shown that the Defendant was not competent to employ counsel and make a defense. We have no such question here.

There are only seven defenses which the Rules permit to be raised by motion and the Federal Courts have consistently required Defendants to confine themselves to those enumerated in Rule 12(b), which does not include the motion to require Plaintiff's attorney to show authority to file a complaint.

"The defenses which may be interposed by motion are confined to those enumerated in Rule 12(b)."

Bowles v. *Glick Bros. Lumber Co.*, 146 F.2d 566—Ninth Circuit (1945), Certiorari denied 325 U.S. 877.

"Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., hereinafter referred to as the Rules, provides that certain defenses may be presented by motion as well as by answer. Nothing in the Rules

indicates that any defenses may be so presented except those enumerated in Rule 12(b)."

Kincaid et al. v. *City of Anchorage*, 99 F. Supp. 1017.

The practice in the State Courts of Tennessee permits one party to challenge the authority of an attorney filing a plea on behalf of another but the authorities are to the effect that the presumption is that an attorney filing a plea is filing it with proper authority. Thus it was said in *Rogers* v. *Lessees*, 23 Tenn. 480, at 482:

> "A power of attorney authorizing the commencement or possession of a suit need not be proved with the formalities required when it is sought to be used as a muniment of title. The attorney is an officer of the Court, responsible to it for a proper and faithful discharge of his duties; and although, when required, he must produce satisfactory evidence of his authority to prosecute a suit yet the presumption is not against, but in favor of, his authority; and, therefore, it has never in this state been required that he should produce a power of attorney authenticated by the forms of law; in fact, a power of attorney in form has not been required at all; any written communication, by letter or otherwise, giving the authority, or recognizing it, has been held, to be sufficient, as would any parol proof of the same fact, as all the Court asks, in addition to the attorney's official responsibility, is such proof as will raise a responsible presumption of the existence of the authority: such, we think, these powers of attorney, authenticated as they are, to be."

The learned District Judge had before him at the time that the order was entered requiring Petitioner's attorney to show authority to act as its attorney, the affidavits of James R. Tipler and Barry M. Carter (A96, A97, A102, A103, A104, A105, A106), as well as the affidavit of the subject attorney, all three of them being directors of the subject corporation. If the District Court were going to

trail off after the procedures followed in the State Courts rather than following the Federal Rules of Civil Procedure, it would find ample authority in three affidavits filed by Petitioner to meet the requirements of the Supreme Court of Tennessee, as deemed by it to be satisfactory evidence.

II

Attorney for Petitioner feels it a reflection upon him to have an order directing and commanding him and his clients to appear and give their depositions. Such a drastic order should not be entered except where there is evidence that a witness or party to a suit has refused to comply with a notice or subpoena. The record in this case reveals the motion of Respondent Dobbs to require these witnesses and their attorney to give their depositions was not served upon either the witnesses or their attorney, nor were they served with a notice to appear before the District Court on September 24, 1963. The evidence is uncontradicted that Respondent Dobbs filed the subject motion on September 23, 1963, and not only failed to serve a copy of the same upon the witnesses or their attorney but failed to notify them of his intention of taking the matter up with the Court on September 24.

Rule 6(d) of the Federal Rules of Civil Procedure requires five (5) days' notice to be served upon adversary counsel. We do not believe the Court was justified in abridging this rule and Petitioner feels that the Court should expunge and strike from the record the motion of Respondent Dobbs to require J. R. Tipler, George A. Davis, Barry M. Carter, Luke Borger, Vernon Goedecke, R. T. Matthews, Carl J. Gates and their attorney, Robert L. Taylor, to appear and give their depositions on October 2, 1963.

It is made to appear from the record that Petitioner, and its director Defendants, and their attorneys, have acted with disrespect for the Court when as a matter of fact they had no notice or the hearing on September 24, 1963. We think the insufficiency of the notice as it appears upon the record is adequate reason for striking the motion, and that it should certainly be struck in light of the affidavits filed by Petitioner.

III

The order overruling the motion of attorney for Petitioner to expunge and strike from the record the motion of Respondent Dobbs to require Tipler et al., to appear and give their depositions on October 2, 1963, included a motion to set aside and vacate the Court's order entered September 26 pursuant to said motion directing and commanding said witnesses to appear and give their depositions on October 2, 1963.

As above stated the order entered requiring the director Defendants of Petitioner corporation, and their attorney, to appear on October 2, 1963, and give their depositions under the penalty of being held in contempt of Court makes it appear that Petitioner and its director Defendants, and their attorneys, have acted with disrespect for the Court. Neither Respondent Dobbs nor his attorney made so much as a bland denial of the charges contained in the affidavits filed in support of the motion to strike Dobbs' motion and to vacate the Court's order entered pursuant to said motion on September 26. Neither the witnesses nor their attorneys are willing to have the record reflect or infer that they have wilfully violated the orders of this or any other Court and consider this order to constitute a smirch upon their good names.

IV

Rule 30(g)(1) of the Federal Rules of Civil Procedure is as follows:

> "If the party giving notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees."

Respondent Robert L. Dobbs, through his attorney and associate and/or partner in the practice of law, Thomas E. Douglas, Jr., (a) served notice upon Petitioner on September 26, 1963, that he would on Wednesday, October 2, 1963, commencing at 9:30 o'clock a.m., in the office of the United States District Court Clerk, take the deposition of Petitioner's attorney, Robert L. Taylor, to continue from day to day until completed. (b) He also procured a subpoena and caused the same to be served upon said witness requiring him to attend the taking of his deposition at the aforesaid time and place. (c) On September 24, 1963, in an ex parte proceeding for which neither Petitioner nor its attorney received notice, Respondent Dobbs procured an order of the District Court directing and commanding said witness to appear and give his deposition on October 2, 1963, at 9:30 o'clock a.m. at the office of the United States District Court Clerk.

It is conceded that he presented himself on October 2 and October 3 and remained in attendance while other witnesses were testifying; that at the request of adversary counsel the taking of his deposition was postponed until October 7, 1963, at 9:30 o'clock a.m., as required by notice, subpoena and order; that he presented himself at the

designated place on October 7 at 9:30 o'clock a.m. and waited until 10:10 o'clock a.m. at which time he left when Respondent Dobbs and his attorney failed to appear; and that he presented himself at approximately 2:15 o'clock p.m. and submitted to examination for nearly four (4) hours, at the end of which the taking of his deposition was adjourned to the following day, October 8; that he again presented himself at the office of the Clerk at 9:30 o'clock a.m. on October 8 and left at 9:50 a.m. when Respondent Dobbs and his attorney again failed to make an appearance.

The Court excused Respondent Dobbs and overruled the motion of Petitioner's attorney for compensation under Rule 30(g)(1) on the theory that there had been a misunderstanding among the lawyers as to the time and place, and that the amount of compensation, if awarded, would be de minimus. We think the learned District Judge was overly tolerant to the detriment and at the expense of Petitioner.

The failure of Respondent Dobbs and his attorney to attend and take the deposition of Petitioner's attorney on October 7 and October 8 after having served notice, procured subpoena requiring his attendance and after having procured an order requiring his attendance can hardly be excused as a misunderstanding. The Court overlooked the fact that Dobbs had made false certificates relating to the notice to take depositions on September 16, 1963, and to the hearing before the District Court on September 24, 1963. Respondent Dobbs does not deny the false certificates and does not claim a misunderstanding on either day. To the contrary the record reflects that he deliberately failed to attend.

Rules 30(g)(1) and 37(a) were adopted to be invoked under this exact situation. It was intended to prevent and deter attorneys from deliberately inconveniencing others.

It is true that Petitioner's attorney was kept waiting only one hour on both occasions. However, considerable time was consumed going to and from the designated place and he was prevented from attending to other business. All in all, the proof will show he lost at least one whole day. Petitioner feels its attorney should be compensated for the inconvenience to which he has been put and intends to see that he is. It also feels that Respondent Dobbs should be required to compensate him, de minimus or otherwise.

We have been unable to find any Federal Court decisions on this point. It might be presumed that lawyers have been reluctant to invoke these rules. However, we think it more probable that they have deterred those who might be inclined to harass their adversaries in such a manner. Suffice it to say, the language of Rules 30(g)(1) and 37(a) is clear and unambiguous and leaves little room

V

The record reveals and reflects that Respondent Dobbs is neither a stockholder, director nor officer of University National Stockholders Protective Committee, Inc. To its cross-claim against him he has filed no responsive plea to the complaint in which he was made a Defendant. If his motions filed as pleas to both actions are sustained there will be nothing for him to litigate. If his motion filed as a plea to Petitioner's cross-claim is sustained it will be dispositive of Petitioner's suit against him. There is nothing in the documents he seeks which could arguably have any bearing on any facet of this case. On the other hand, some of these documents have been entrusted to the care and custody of Petitioner's attorney, and the rest of them are part of his work product. The records relating to contributions and disbursement are matters of a confidential nature subject to examination by the stockholders, directors and officers, and no one else.

There is no claim made by anyone of misappropriation or misapplication of funds or other assets. There has been no showing or any attempt to show that the documents sought by the subpoena duces tecum served upon Petitioner's attorney are relevant or material. The rule is well established that a subpoena duces tecum requiring the production of documents should be quashed unless a showing of good cause to justify their need was made. It is true that most of the authorities are reported District Court opinions in Federal Rules Decisions. However, there are two appellate Court decisions on this question, one from the Sixth Circuit. The decision from this Court to which we refer is *In re Manufacturers Trading Corp.*, 194 F.2d 948, where the action of the District Court for the Northern District of Ohio in refusing to quash a subpoena duces tecum was affirmed. The Court at page 959 bottomed its decision on the failure to show that the documentary evidence sought was not relevant and material. This is not the case here as the record clearly shows that the documents sought for examination by Respondent Dobbs are irrelevant and immaterial, and in no way germane to the issues raised. In the cited case the party resisting the subpoena duces tecum does not seem to have claimed the documents to have been irrelevant or immaterial, but that the Court acted arbitrarily in refusing to quash the subpoena. It is not on all fours with the case at bar but it does square with the general rule as laid down by the Circuit Court of Appeals of the District of Columbia in 1960 and the many decisions published in the Federal Rules Decisions series.

> "Nonetheless, when a party objects to the enforcement of a subpoena, *enforcement depends preliminarily on a showing of good cause by the party seeking production*. 'Good cause' may ordinarily be sustained by a claim that the requested documents are necessary

to establishment of the moving party's claim of that denial of production would cause the moving party 'undue hardship or injustice.' *And the burden of showing good cause is an affirmative one* in that it is not satisfied merely by a showing that justice would not be impeded by production of the documents."

Boeing Airplane Company v. *Coggeshall*, 380 F.2d 654, 659.

"Even in the case of a subpoena duces tecum where the one upon whom it is served does not attack it for unreasonableness or oppressiveness but complies and produces the identified document at a deposition, *that still does not give the examiner the right to inspect or copy it without an independent order under Rule 34 upon a showing of good cause.*"

Joseph L. Lee, Inc., v. *Margon Corp.*, 18 F.R.D. 390, 391 (D.C., N.Y., 1956).

"On such a motion [to quash] the party serving the subpoena is required to make the same showing of 'good cause' as is required by Rule 34, F.R.C.P. Sogorsky v. Maylon, D.C. S.D. N.Y., 12 F.R.D. 486."

Sensytrol Corp. v. *Radio Corp. of America*, 18 F.R.D. 279, 280 (D.C., N.Y., 1955).

"The generally accepted view is that Rule 45 is *in pari materia* with Rule 34 and good cause must be shown for the production of documents sought through Rule 45." Citing Moore's Fed. Practice (2d Ed.)

Conn. Mut. Life Ins. Co. v. *Shields*, 17 F.R.D. 273, 275 (D.C., N.Y., 1955).

"Although Rule 45 does not in terms require a showing of good cause for the issuance of a subpoena duces tecum, that requirement of Rule 34 has been read into all procedures for obtaining discovery of documents. See Sogorsky v. Maylon, D.C. S.D. N.Y., 12 F.R.D. 486."

Schwartz v. *Broadcast Music*, 16 F.R.D. 31, 33 (D.C., N.Y., 1954).

"If a subpoena duces tecum is directed to a party, particularly at a deposition hearing, the specific terms of Rule 34 should govern. 28 U.S.C.A.; 5 Moore's Federal Practice, p. 1054. Therefore, good cause must be shown for the production of these documents."

Panamusica Venezuela, C.A. v. *American Steel Exp. Co.*, 16 F.R.D. 280, 289 (D.C., N.Y., 1954).

"The requirements of Rule 34 as to 'good cause' are to be read into Rule 45(b)."

Demeulenaere v. *Rockwell*, 13 F.R.D. 134, 136 n. 1 (D.C., N.Y., 1952).

"This court is, therefore, unable to pass upon the merits of this motion [to quash subpoena duces tecum] and effect substantial justice between the parties. The complaint and answer are not before it, and it cannot be said, on the presentation here made, that the documents sought are material, or probably material, or constitute or contain evidence. See, United States v. Aluminum Co. of America, D.C., 1 F.R.D. 57 and 62; 403-411 East 65th St. Corp. v. Ford Motor Co., D.C., 27 F. Supp. 37."

"In the light of the conflicting statements of the attorneys for the respective parties as to whether the District Court for New Jersey has passed upon an application for similar relief, and in view of the fact that this court cannot determine the materiality of the items sought without the record before it, the motion [to quash] is granted. . . ."

Ellis-Foster Co. v. *Reichhold Chemicals, Inc.*, 7 F.R.D. 572, 573 (D.C., N.Y., 1947).

Subpoena duces tecum would be quashed where it was not certified that matter requested was material to issue. *Pentland* v. *Dravo Corp.*, 4 F.R.D. 305, D.C., Pa., 1945.

Subpoena calling for immaterial and irrelevant documents would be quashed. *Chase Nat'l Bank* v. *Portland Gen. Elec. Co.*, 2 F.R.D. 484, D.C., N.Y., 1942.

A motion to quash subpoena duces tecum would be granted unless it was made to appear that the documents called for contained evidence which was material or probably material. *U. S.* v. *Aluminum Co. of America*, 1 F.R.D. 62, D.C., N.Y., 1939.

The above cited authorities all deal with motions to quash subpoenas duces tecum issued pursuant to Rule 45(b) of the Federal Rules of Civil Procedure. Such a motion was made by Petitioner and was attached to the petition filed with the Circuit Court of Appeals, Sixth Circuit, as Exhibit H. By paragraph 7 on page 6 of its order entered October 24, 1963, the Court overruled Petitioner's motion to quash when the record does not evidence "good cause" as required by the above cited and quoted authorities. To the contrary, the record shows that the documents sought were immaterial and irrelevant to this suit. This issue does not involve an abuse of discretion but, instead, a failure by the District Court to apply the provisions of Rule 45 to the existing facts.

In his order the District Judge both overruled the motion of Petitioner to quash the subpoena duces tecum in the face of all reported authorities holding contrary to his determination of the law and sustained Respondent Dobbs' oral application or motion to require the witness to produce documentary evidence without any showing or claim of relevancy or materiality. The motion of Petitioner to quash the subpoena and the motion of Respondent Dobbs necessarily had to be decided in some consistent and compatible manner. The Court could hardly have sustained both, or overruled both. The law is well established contrary to the determination and decision of the District Court. Moreover, Petitioner's motion was in writing and spelled out the reasons why the witness should not have been required to produce the documents sought.

and verified. Dobbs' application or motion to require the production of these documents, on the other hand, was not in writing, not verified and no reason was given to support the order of the Court.

So far as we are able to determine there is only one reported case passing upon this issue, i.e., the propriety of ordering a witness to produce documentary evidence as sought by a subpoena duces tecum and resisted by the witness. The Court in this case not only held in accord with the decisions above cited and quoted, but it went a step further and held that an order requiring a witness to produce documentary evidence should never be made until and unless the Court is satisfied that the evidence sought is germane to the issues framed by the then existing pleadings, and that the onus was upon the party seeking the evidence to prove its materiality.

> "It is contended by plaintiff's counsel that Rule 34 imposes upon the movant the duty to show good cause why documents mentioned should be produced. And counsel contend that some showing should be made in respect of same in Rule 45.
>
> "On the other hand it is the belief of counsel for the defendant that the provisions of Rule 45 places upon the one subpoenaed the responsibility to show that the subpoena is unreasonable and oppressive.
>
> "The foregoing should be answered by the court by saying that judges should never make orders on motions of the kind under consideration except that it may appear that the requests are reasonable and would not unduly burden the one to whom the subpoena is addressed. To this extent the duty devolves upon the movant to show with reasonable clarity the propriety of the motion and the reasonableness of the request made."
>
> *Colo. Mill. & Elev. Co. v. American Cyanamid Co.* 12 F.R.D. 339, 340 (D.C., Mo. 1952).

VI

Without fear of contradiction we believe Petitioner's original attorney has been the most sought after and "ordered" witness of all times. He was served with a subpoena on September 9, 1963, to appear and give his deposition on September 16, 1963. He was notified by notice mailed September 8, 1963, to give his deposition on September 16, 1963. On September 26, 1963, pursuant to an ex parte hearing on September 24, 1963, of which he had no notice, he was ordered to appear on October 2, 1963, and give his deposition. A notice was served upon him on September 26, 1963, to give his deposition on October 2, 1963. He was served with a subpoena on September 27, 1963, to give his deposition on October 2, 1963. Finally, on October 24, 1963, an order was entered directing him to submit himself to further examination on October 21, 1963, said order being entered pursuant to the oral application of Respondent Dobbs on October 9, 1963, and stayed by the Court pending the filing of petition for certiorari with the Circuit Court of Appeals, Sixth Circuit. All in all, he has presented himself for examination on six different occasions, has responded to notice to appear before the District Judge in connection with the same on a half dozen occasions, not counting the ex parte hearings at which times he was either disabled and unable to attend, or had no notice of them.

Rule 30(a) lays down the manner in which notice shall be given for the taking of depositions. We have made an exhaustive search for a decision of the Federal Courts relating to adjournments after the deposition has been commenced pursuant to notice and/or subpoena. We have been unable to locate a single case under the annotations to Rules 30 and 45 in United States Code Annotated.

We have searched Moore and Barron and Holtzoff and there is no mention of this particular dispute ever having arisen. The Rules themselves are of no assistance. There is no prescribed official form. The closest we are able to come to an authority are the forms recommended by Moore and by Barron and Holtzoff. Each of these provide for the name of deponents, the time and place, and the phrase "from day to day" thereafter as may be required. Dobbs' notice directed Petitioner's attorney to present himself for examination on October 2, 1963, at 9:30 a.m. at the office of the Clerk of the District Court at Memphis *"and continuing from day to day until completed."*

The only logical construction that anyone can places upon the language "on Wednesday, the 2nd day of October, 1963, commencing *at 9:30 a.m.*, in the Clerk's Office of the District Court of the United States, Western Division, Memphis, Tennessee, *and continuing from day to day until completed*" is that the witnesses subpoenaed pursuant to this notice would attend from day to day beginning at 9:30 a.m. on each day. Neither the Federal Rules of Civil Procedure nor the United States Code gives to a party or his attorney the power to adjourn the taking of a deposition to some subsequent time to suit his own convenience. And yet this is what Respondent Dobbs has sought to do and the order of the Court of which Petitioner complains gives approval to such trampling upon the rights of Petitioner and its attorney by Dobbs' premeditated and calculated course of harassment.

Petitioner's attorney appeared twice at the designated time and place as required by notice, subpoena and order of Court: October 7, 1963, at 9:30 a.m. and October 8, 1963, at 9:30 a.m. The party causing him to present himself for examination on those two occasions and his attorney failed to appear within a reasonable period of time whereupon

the witness went his way. Certainly, Respondent Dobbs forfeited his right to examine this witness further by virtue and on the authority of the notice served upon him on September 26, the subpoena served upon him on September 27 and the Court's order of September 26. The order of the Court entered October 24, 1963, in effect, reinstated the notice and subpoena which had been rendered void and inoperative as a result of the default of the party giving the notice and procuring the subpoena. This order was not a matter of discretion with the District Court but was illegal and unlawful in that the Court has no such power or authority and, therefore, acted in excess of jurisdiction.

Under the provisions of Rule 37(a) the District Court is empowered to enter an order compelling a witness to answer where he has refused to do so, but this is not such a situation. Here, the witness sought in vain to comply with the notice and subpoena served upon him and answered all questions put to him not privileged or otherwise legally objectionable.

VII

Last, but certainly not least, we face the issue of the propriety of the Court's order overruling Petitioner's written motion to require Respondents Russell and Dobbs, and Dobbs' partner or associate, Thomas E. Douglas, Jr., to present themselves on October 17, 1963, and give their depositions. They had been properly notified on October 1, 1963, to appear at the offices of Taylor & Taylor, at 2:00 o'clock p.m. on October 8, 1963, for this purpose. Subpoenas had been issued on October 2, 1963, requiring their attendance at the above designated time and place. They made an appearance, it is true, but they refused to give their depositions.

Petitioner sought an order compelling them to give their depositions on October 17, 1963, as provided by Rule 37(a). There was no motion to quash filed and no cause shown for their refusal to obey the notices and subpoenas served upon them. They openly defied the legal obligation imposed upon them by Rules 30 and 45.

The District Judge had willingly entered orders commanding a great number of other parties and witnesses to appear and give their depositions under the threat of contempt proceedings, even where not justified or authorized by law, as hereinabove demonstrated. Yet here was a situation requiring an order commanding Respondents Dobbs and Russell and Douglas to appear as a result of their refusal to obey notices and subpoenas properly served upon them where the Court refused Petitioner the relief to which it was entitled under Rule 37(a). This was not only an abuse of discretion but denied Petitioner its right to equal protection, privileges and immunities under the law in violation of its constitutional right. The Court denied Petitioner the relief it had granted Respondents on several occasions although the record is uncontradicted that Petitioner had complied with all applicable rules and that Respondents had failed and refused to comply.

CONCLUSION

Petitioner, as shown by the record, is a Tennessee corporation organized to protect the interests of the stockholders of University National Life Insurance Company. That company was, at the time of the organization of Petitioner, being operated by a group of incompetent directors who had wasted and dissipated more than two million dollars ($2,000,000.00) in less than two years. The president of the company had been arrested by the vice squad

of the Memphis Police Department on a morals charge. He was arrested while in the act of having unnatural sex relations with one of the company employees. The directors refused to discharge him although Petitioner's directors made demand that they do so. He forfeited on his bond on the day set for his trial.

The officers of University National Life Insurance Company had filed false and fraudulent statements of the company's financial condition with the several Departments of Insurance of the states in which the company had been licensed to do business. They had mailed false and fraudulent statements to its stockholders and policyholders. They were paying exorbitant salaries and expense accounts and refused to put the house in order.

One of the officers was also an officer in a mortgage loan concern from whom Respondent life insurance company had bought a large number of undesirable loans. One of the officers, whose only duty was countersigning checks, was paid eight hundred dollars ($800.00) per month, and also received an additional allowance for his secretary. He is a lawyer by profession and was a practicing attorney during the entire life of the company.

None of the directors knew anything about the life insurance business. The Chairman of the Board could not tell, on discovery deposition, whether the company wrote participating or non-participating insurance and confessed that he did not know one type of life insurance policy from another.

Petitioner singlehandledly removed these officers from office through a very vigorous and expensive proxy campaign. Its cross-claim against University National Life Insurance Company is to recover these expenses and to recover for the benefit of all stockholders the money

wasted by the company seeking to perpetuate these incompetent officers in office.

Petitioner is also seeking to defend itself and its officers and directors against the suit brought against them by Plaintiffs in this cause, who are not parties to this litigation in this Court.

Petitioner is being thwarted in its attempts to avail itself of the privileges, protection and immunities to which it is entitled by the Federal Rules of Civil Procedure and the laws and Constitution of the United States. No final order has gone down from which an appeal will lie and by the time such an order is entered Petitioner will have suffered severe and irreparable injury. Petitioner merely seeks to have the cause tried in an orderly manner according to the rules prescribed for all litigants.

Petitioner finds itself in this plight: if it continues along the course which it has followed and suffers the deprivations and denials of the rights guaranteed it and delays a review of the matters of which it complains until an appealable order is made, it will then be too late to do anything about it. It cannot properly and adequately defend itself and prosecute its cross-claim under the circumstances as created by the District Judge. Moreover, it would be required to undergo the delay and additional expense of an appeal in which the errors of which Petitioner here complains will be comingled with all manner of other complaints and, whether successful or unsuccessful in the District Court, possibly suffer the further delay and expense of a second trial which the Court can see will be a long, drawn out, bitter trial from which this Court can

extricate all the parties if it will exercise the authority and jurisdiction conferred upon it as sought to be invoked by this Petitioner.

Petitioner is composed of little people, working men and women, holding small blocks of stock. Many of the stockholders mortgaged their homes and borrowed money to buy stock in Respondent life insurance company. Many have been forced to sell at a great financial loss. If Petitioner is denied a hearing it will impose additional hardship and sacrifice.

No doubt the argument will be made that those matters of which Petitioner complains are matters with which the District Court may exercise discretion. Certainly it is discretionary as to some but not as to all. Petitioner respectfully represents that the learned District Judge was not warranted in his determination of the matters in the manner that he did. Where his acts and orders were not offensive to and in direct violation of the Federal Rules of Civil Procedure, he reacted to the requests of Petitioner contrary to his reaction to the requests of Respondents where the facts and equities were identical or substantially identical. His exercise of "absolute discretion" was an abuse of the authority vested in him and violated Petitioner's rights so as to shock the conscience of the Court.

For the foregoing reasons, we respectfully submit that this petition be granted and that the errors of which Peti-

tioner has herein complained be rectified by judgment and order of this Court.

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CERTIFICATE OF SERVICE

I, ROBERT L. TAYLOR, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Petition for Certiorari and the following Appendices (bound separately) were this day served upon the adverse parties in accordance with the provisions of the Supreme Court Rules 21(1) and 33 by depositing the same in the U. S. Post Office at Memphis, Tennessee, with first class postage prepaid addressed to their attorneys of record at their respective offices as follows:

John M. Heiskell and
Carl H. Langschmidt, Jr.
Commerce Title Building
Memphis, Tennessee

Thomas E. Douglas, Jr., and
Robert L. Dobbs
Exchange Building
Memphis, Tennessee

This ..... day of March, 1964.

.....

ROBERT L. TAYLOR